No. 84-45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DOLORES E. MOE, ERIC R. MOE, KRIS L. MOE, AND LEIF A. MOE; JUDY ELAINE RENZELMAN, INDIVIDUALLY, AND AS CONSERVATOR AND NEXT FRIEND OF MINOR BRAD ALLEN RENZELMAN; ELAINE L. WHISTLER, PAUL W. WHISTLER, DIANE WHISTLER AWALT; JOAN ELAINE ANDERSON, INDIVIDUALLY, AND AS GUARDIAN AD LITEM AND NEXT FRIEND OF MINORS ELIZABETH JOAN ANDERSON AND CHRISTOPHER ANDREW ANDERSON; BEVERLY L. MILES; AND THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, A COLORADO CORPORATION,

Petitioners,

vs.

AVIONS MARCEL DASSAULT-BREGUET AVIATION, FALCON JET CORPORATION AND THE GARRETT CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WELLER, FRIEDRICH, HICKISCH, HAZLITT & WARD
W. Robert Ward
Counsel of Record
Edward J. Godin
100 Fillmore St., Suite 500
P. O. Box 6178
Denver, Colorado 80206
(303) 322-9100
Attorneys for Respondent Avions Marcel Dassault-Breguet Aviation

MENDES & MOUNT
Matthew J. Corrigan
Three Park Avenue
New York, New York 10016
(212) 683-2400

TILLY & GRAVES, P.C.
Ronald O. Sylling
Counsel of Record
David M. Setter
701 Ptarmigan Place
3773 Cherry Creek North Drive
Denver, Colorado 80209
(303) 321-8811
Attorneys for Respondent Falcon Jet Corporation

KELLY, HAGLUND, GARNSEY & KAHN
Edwin S. Kahn
Counsel of Record
1441 18th Street, Suite 300
Denver, Colorado 80202
(303) 296-9412
Attorneys for Respondent The Garrett Corporation

PERKINS, COIE, STONE, OLSEN & WILLIAMS
Keith Gerrard
Richard C. Coyle
Rex C. Browning
1900 Washington Building
Seattle, Washington 98101
(206) 682-8770

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

No. 84-45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DOLORES E. MOE, ERIC R. MOE, KRIS L. MOE, AND LEIF A. MOE; JUDY ELAINE RENZELMAN, INDIVIDUALLY, AND AS CONSERVATOR AND NEXT FRIEND OF MINOR BRAD ALLEN RENZELMAN; ELAINE L. WHISTLER, PAUL W. WHISTLER, DIANE WHISTLER AWALT; JOAN ELAINE ANDERSON, INDIVIDUALLY, AND AS GUARDIAN AD LITEM AND NEXT FRIEND OF MINORS ELIZABETH JOAN ANDERSON AND CHRISTOPHER ANDREW ANDERSON; BEVERLY L. MILES; AND THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, A COLORADO CORPORATION,

Petitioners,

vs.

AVIONS MARCEL DASSAULT-BREGUET AVIATION, FALCON JET CORPORATION AND THE GARRETT CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Avions Marcel Dassault-Breguet Aviation (AMD), Falcon Jet Corporation (Falcon Jet), and the Garrett Corporation (Garrett), submit that the Petition for Writ of Certiorari should be denied.

LIST OF PARTIES

All parties to the proceeding in the United States Court of Appeals for the Tenth Circuit are listed in the caption. Respondents hereby identify their parent, subsidiary and affiliate corporations.

AMD's parent company is Societe Central Etudes Marcel Dassault. AMD lists the following subsidiaries and affiliates: Generale de Mecanique Aeronautique; Dassault Systemes; Dassault Systemes USA, Inc.; Dassault International; Centre Technique d'Assurances Generales; Dassault Aero Service; Compagnie de Gestion de Rechanges Aeronautiques; Corse Composites Aeronautiques; Falcon Jet Corporation, Dassault International U.S.A.; Sociedad de Coordinacion Aeronautica; Societe Toulouse-Colomiers; Societe Immobiliere Velizy Toulouse; Societe Immobiliere Anglet-Parme; Office General de L'eir; Office Francais Desportation de Materiel Aeronautique; Societe European de Construccion du Breguet Atlantique; Societe European de Produccion de L'Avion Ecat; Societe de Maintenance de Materiel Aerienne; Societe D'etude de Construccion de Soufleries Simulator et Instrumentation Aerodynamique; Societe Sogitec Industries; Europe Falcon Service; American Falcon Service; Falcon Owning Company; Investment Procurement Service; and Centre D'Instruction Falcon.

Respondent Falcon Jet's parent corporations are respondent AMD and Dassault International U.S.A. Falcon Jet lists the same affiliates as listed by AMD. Counsel of Record for respondent Falcon Jet has requested confirmation of the current accuracy of the above listing and will promptly advise the Court and parties of amendments, if any.

Respondent Garrett's parent corporation is the Signal Companies, Inc. Garret lists the following subsidiaries or affiliates: Normalair-Garrett, Ltd.; Ampex Corporation; Dunham-Bush, Inc.; Signal Capital Corp.; UOP, Inc.; Wheelabrator-Frye, Inc.; Onyx Land Co.; Golden West Indemnity Company, Ltd.; Signal Oil & Gas Company; Signal

Landmark Properties, Inc.; Konishiroku Ampex Company, Ltd.; Industrial Turbines International, Inc.; International Turbine Engine Corporation; Nikki-Universal Co., Ltd.; Nikki Woverine, Inc.; Universal-Matthey Products G.m.b.H.; and Universal-Matthey Products, Ltd.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete, argumentative and misleading. Respondents respectfully refer the Court to the concise, impartial statement of the case set forth in the opinion of the United States Court of Appeals for the Tenth Circuit. *Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 920-23 (10th Cir. 1984) (Petition Appendix A-4 to A-9). The statement of the case prepared by the Tenth Circuit contains facts material for consideration of the questions presented. That statement of the case is hereby adopted and incorporated by reference by respondents.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because:

I. THE PETITIONERS HAVE FAILED TO PRESENT WITH ACCURACY, BREVITY AND CLEARNESS WHAT IS ESSENTIAL TO A READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION, AS REQUIRED BY THE SUPREME COURT RULES, RULE 21.5.

II. THERE IS NO SPECIAL OR IMPORTANT REASON THIS DIVERSITY CASE SHOULD BE REVIEWED ON WRIT OF CERTIORARI.

A. THE TRIAL COURT'S REFUSAL TO ADMIT INTO EVIDENCE PLAINTIFFS' EXHIBIT 19 WAS UPHELD BY THE TENTH CIRCUIT ON

THE INDEPENDENT GROUND OF PROPER EXERCISE OF DISCRETION BY THE TRIAL COURT IN THE BALANCING MANDATED BY FED. R. EVID. 403. THIS IS NOT A RULE 407 CASE.

B. THE TRIAL COURT CORRECTLY APPLIED THE LAW OF COLORADO IN INSTRUCTING THE JURY ON THE AFFIRMATIVE DEFENSES OF ASSUMPTION OF THE RISK (NO. 46) AND MISUSE (NO. 45), AND THE TENTH CIRCUIT PROPERLY FOUND NO ERROR IN THE TRIAL COURT'S SUBMISSION OF THESE INSTRUCTIONS.

C. THE APPELLATE COURT DID NOT ERR IN UPHOLDING THE TRIAL COURT'S EXERCISE OF ITS DISCRETION IN ORDERING SEPARATE TRIALS ON ISSUES OF LIABILITY AND DAMAGES.

D. THE APPELLATE COURT DID NOT ERR IN HOLDING THAT THE JURY INSTRUCTIONS WERE THOROUGH AND ADEQUATE OR IN APPLYING THE "PLAIN ERROR" STANDARD PURSUANT TO FED. R. CIV. P. 51.

E. THE APPELLATE COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF NATIONAL TRANSPORTATION SAFETY BOARD (NTSB) INVESTIGATOR JAMES LEWIS REGARDING HIS OBSERVATIONS AT THE SCENE OF THE ACCIDENT BECAUSE THE TESTIMONY DID NOT EMBRACE ANY OFFICIAL NTSB OPINION AS TO THE PROBABLE CAUSE OF THE ACCIDENT.

ARGUMENT

I. THE PETITIONERS HAVE FAILED TO PRESENT WITH ACCURACY, BREVITY AND CLEARNESS WHAT IS ESSENTIAL TO A READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION, AND THIS IS SUFFICIENT REASON FOR DENYING THE PETITION PURSUANT TO SUPREME COURT RULES, RULE 21.5.

The most flagrant inaccuracy and failure of clarity is petitioners' representation that the instructions imputed the negligence of the pilots to the passengers, and that the Tenth Circuit identified the errors of the lower court in such instructions but ruled the error non-prejudicial.

At page 6 of the Petition, petitioners state, "Negligence of the pilots was imputed to the passengers by an erroneous jury instruction supplied by the defendants." This argument of petitioners is expanded at page 20 of the Petition.

At page 7 of the Petition, petitioners allege, "The Tenth Circuit also identified errors of law in jury instructions supplied by the defendants, but because of the non-finding of causation by the jury, ruled the errors not prejudicial . . . . " This argument is expanded at pages 26 through 28 of the Petition.

In fact, the trial court specifically instructed the jury that the negligence, if any, of the operator and the pilots was not chargeable to the plaintiff-passengers. The Tenth Circuit held:

> Finally, and in our view decisive of the contention here presented, the trial court [in ruling on plaintiffs' post trial motions] pointed to Instruction 37 regarding imputation of negligence which, in part, read:
>
> > The negligence, if any, of Mountain Bell, Kenneth Moe [pilot] or Rodney Renzelman

> [co-pilot] is not chargeable to plaintiff Beverly L. Miles or to the Anderson plaintiffs or the Whistler plaintiffs [passengers].

727 F.2d at 928 (Petition Appendix at A-21).

Petitioners argue, at page 20 of the Petition, that Instructions 27A, 29 and 30, dealing with plaintiffs' claims of manufacturers' liability based on negligence, misstated Colorado law and that only affirmative defenses *other than contributory negligence* should be included in the instructions, relying on Colorado Jury Instructions Civil 2d, 14:1 [hereinafter *CJI-Civ.2d*] (Petition Appendix at P-1, P-2). Petitioners deliberately omitted from Appendix P the following language from the Notes on Use contained in *CJI-Civ.2d* 14:1 (1980):

> Whenever the defense of contributory negligence has been properly raised, the numbered paragraphs of this instruction should be substituted for the numbered paragraphs of Instruction 9:2 and that Instruction should then be used in accordance with its Notes on Use.

See Respondents' Appendix B.

CJI-Civ.2d 9:2, Elements of Liability, Comparative Negligence, includes the language petitioners criticize, *i.e.*, "unless you also find by a preponderance of the evidence that the plaintiff was contributorily negligent . . . . " *See* Respondents' Appendix A. The pattern instruction then refers the jury to the verdict form as did the instructions given to the jury below. The Notes on Use for Instruction 9:2 direct, "Whenever this instruction is given, the appropriate comparative negligence instruction must also be given. See Instructions 9:33-9:40." *Id.* As the Tenth Circuit opinion points out, "The court likewise, by Instruction 34, instructed the jury on the Colorado comparative negligence law pursuant to § 13-21-111, C.R.S. 1973." 727 F.2d at 926 (Petition Appendix at A-16). The instructions on plaintiffs'

claims based on negligence were correct and did not impute the negligence of the pilots, if any, to the passengers.

The Tenth Circuit carefully and thoroughly reviewed the total record and the instructions on the plaintiffs' claims based on negligence. *See* 727 F.2d at 923-26 (Petition Appendix at A-10 to A-16). The Tenth Circuit found that, "The jury was, on the basis of the totality of the instructions, more than adequately advised of the negligence claims and the applicable Colorado law." 727 F.2d at 926 (Petition Appendix at A-16). The Tenth Circuit continued, "Assuming, arguendo, that Instructions 27A, 29 and 30 were erroneous, such error was harmless. This is so because the jury found no causal negligence on the part of any defendant. It was for this reason that there was no jury finding of contributory or comparative negligence." 727 F.2d at 926 (Petition Appendix at A-16).

Certainly, an arguendo assumption by the Tenth Circuit does not support petitioners' argument at page 26 of the Petition that, "The Tenth Circuit agrees that the language [of Instructions 27A, 29 and 30] *misstates* the law of Colorado . . . . " The Tenth Circuit did not so hold.

In addition to the flagrant inaccuracies of the Petition as to the negligence instructions and the Tenth Circuit's opinion thereon, a comparable thread of inaccuracy and lack of clarity exists in petitioners' presentation of other points, including their arguments regarding the trial court's exercise of discretion; the express basis of exclusion of Exhibit 19, Arthur Q and hydraulic field service reports and evidence of the McGraw-Edison post-accident incident; and the alleged conflict among the panels of the Tenth Circuit and among the various circuits regarding Fed. R. Evid. 407. The inaccuracies and lack of clarity in the Petition are demonstrated by a reading of the Tenth Circuit opinion in this case, which fully reviewed and carefully evaluated these points and affirmed the judgment of the trial court.

Petitioners have failed to present with accuracy, brevity and clearness what is essential to a ready and adequate understanding of the points petitioners contend require consideration. Petitioners have not complied with Rule 21.5 of this Court's rules, and the Petition should be denied.

II. THERE IS NO SPECIAL OR IMPORTANT REASON THIS DIVERSITY CASE SHOULD BE REVIEWED ON WRIT OF CERTIORARI.

A. THE TRIAL COURT'S REFUSAL TO ADMIT INTO EVIDENCE PLAINTIFFS' EXHIBIT 19 WAS UPHELD BY THE TENTH CIRCUIT ON THE INDEPENDENT GROUND OF PROPER EXERCISE OF DISCRETION BY THE TRIAL COURT IN THE BALANCING MANDATED BY FED. R. EVID. 403. THIS IS NOT A RULE 407 CASE.

The Tenth Circuit, after full review of the entire trial record, the trial court's evidentiary hearings and rulings both before and during trial, and the trial court's legal reasoning, disagreed with the trial court's conclusion that Fed. R. Evid. 407 applies in a diversity action without regard to state law, but held that no harm resulted therefrom because the trial court "*expressly* excluded the evidence 'under 403 because of unfair prejudice and jury confusion, and balancing that we have endeavored to do under Rule 403.' " 727 F.2d at 934 (Petition Appendix at A-33). The Tenth Circuit fully reviewed the trial court's balancing process and the elements thereof, applying the criteria of Fed. R. Evid. 403 and 103(a), and the similar rules under the Colorado cases, Colo. R. Civ. P. 61, and the Colorado Rules of Evidence. The Tenth Circuit specifically held: "We thus hold that the trial court did not abuse its discretion and did not err in denying admission of Plaintiffs' Exhibit 19 into evidence." 727 F.2d at 934 (Petition Appendix at A-34). The Tenth Circuit ruling is succinctly

summarized in the concurring opinion of Circuit Judge McKay:

> I concur in result and in the opinion of the court except to the extent that it purports to resolve the difficult question of possible conflict between state and federal rules of evidence. As the court's opinion makes clear, that discussion is not necessary to our decision which properly rests on the independent ground of balancing mandated by Rule 403 and parallel state authority.

727 F.2d at 936 (Petition Appendix at A-38).

The Tenth Circuit has consistently ruled that evidence admissible under Rule 407 must be evaluated under the other rules of evidence, including Rule 403, case law, and the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 61. *See Meller* v. *Heil Co.*, Nos. 82-1858 & 82-1883 (10th Cir. Jan. 16, 1984), *cert. denied*, 104 S.Ct. 2390 (May 21, 1984); *Herndon* v. *Seven Bar Flying Service, Inc.*, 716 F.2d 1322 (10th Cir. 1983), *cert. denied*, 104 S.Ct. 2170 (April 30, 1984); *Rimkus* v. *Northwest Colorado Ski Corp.*, 706 F.2d 1060, 1066 (10th Cir. 1983).

In *Herndon*, the Tenth Circuit clearly set forth the scope of the trial court's discretion regarding admissibility of evidence under Rule 407. The Tenth Circuit further set forth the standard of review on appeal regarding that exercise of discretion in a Rule 407 case:

> The trial court, in exercising its discretion regarding admissibility, must examine the background of the rule together with the rule itself. The court may also look to the reasoning employed by other circuit, district or state courts in reaching their decisions. See *Hartford* v. *Gibbons and Reed Co.*, 617 F.2d 567, 569 (10th Cir. 1980); *Cottonwood Mall Shopping Center, Inc.* v. *Utah Power and Light Co.*, 440 F.2d 36, 40 (10th Cir.), *cert. denied*, 404 U.S. 857, 92 S.Ct. 107, 30 L.Ed. 2d 99 (1971). No New

> Mexico court has yet addressed the issue of admissibility of subsequent repair evidence in a strict liability case. We therefore apply Rule 407 of the Rules of Evidence.
>
> In reviewing the trial court's decision to admit or to exclude evidence, this court looks not only to the propriety of the trial court's legal reasoning, it also considers the trial court's evidentiary decision as a whole; that is, in the context of the entire trial record. *Prudential Insurance Co. of America* v. *Faulkner*, 68 F.2d 676, 678 (10th Cir. 1934). If the record were to indicate that the trial court set forth inadequate reasons or no reasons for its evidentiary decision, this court would examine the record to determine whether the facts supported the trial court's decision. *Sims Consolidated, Ltd.* v. *Irrigation and Power Equipment, Inc.*, 518 F.2d 413, 418 (10th Cir. 1975). An error in either admitting or excluding evidence does not justify the setting aside of a verdict or the granting of a new trial unless the error affected the substantial rights of the parties. Rule 61, Fed. R. Civ. P.; *Harris* v. *Quinones*, 507 F.2d 533 (10th Cir. 1974).

716 F.2d at 1326.

This ruling is consistent with Colorado cases and authorities cited by the Tenth Circuit in its opinion in this case. 727 F.2d at 934 (Petition Appendix at A-33 to A-34). The Colorado cases and authorities support the proposition that error may not be predicated upon a ruling which admits or excludes evidence unless the court's action is inconsistent with substantial justice or it affected a substantial right of a party.

The Tenth Circuit applied this standard in review of the trial court's exercise of discretion in this case and concluded that the trial court properly exercised its discretion in excluding Exhibit 19 from evidence after balancing the probative

value of the evidence against the prejudicial effect as mandated by Rule 403 and case law. The Tenth Circuit noted that feasibility of the warning about the autopilot failure was not controverted. 727 F.2d at 934 (Petition Appendix at A-33). The appellate court further stated, after review of the record:

> This portion of the record demonstrates, in our view, that the trial court did permit plaintiffs to effectively employ the crux of Exhibit 19 for impeachment purposes and that, therefore, the plaintiffs were not unfairly prejudiced by the exclusion of the exhibit from evidence.

727 F.2d at 935 (Petition Appendix at A-35).

Plaintiffs made no offer of Exhibit 19 to rebut defendants' evidence of pilot negligence and misuse.

This Court denied certiorari in *Herndon* and *Meller* as shown by the citations above. Both of these cases squarely involved Rule 407. The petitioners incorrectly argue that the present case presents important issues regarding Rule 407. This is not the case. The case at bar was ultimately decided pursuant to Rule 403.

Respondents submit that any special or important reasons for review by this Court regarding the applicability of the Rule 407 exclusion to a diversity-strict liability case should be presented in a Rule 407 case. This is not a proper case for review since the exclusion of Exhibit 19 was approved based on Rule 403 and parallel authorities.

It should be noted the admissibility of Exhibit 19 is irrelevant to petitioners' claims against respondent Garrett. Plaintiffs' Exhibit 19 was never offered against Garrett, as is shown in Plaintiffs' List of Witnesses and Exhibits for Trial, filed December 4, 1980, and Plaintiffs' Response to Defendant Falcon Jet Corporation's Motion in Limine, filed January 5, 1981. These filings stated that Exhibit 19 was offered against only Falcon Jet and AMD. Exhibit 19 related to the autopilot. Garrett manufactured the engines of the subject

aircraft. Petitioners' claims against Garrett had nothing to do with the autopilot, and Exhibit 19 had no relevance to petitioners' claims of defects in the Garrett engines.

No controversy regarding admissibility of Exhibit 19 exists between petitioners and respondent Garrett. The decision of the Tenth Circuit regarding this issue should therefore be ruled final as to respondent Garrett.

The appellate court carefully examined and reviewed the evidentiary rulings of the trial court, applying established criteria for review, and found no prejudicial error in the denial of admission of Exhibit 19, and various other testimony and documents. 727 F.2d at 935 (Petition Appendix at A-35 to A-36). The Petition is incomplete and inaccurate concerning the exclusion of evidence of Falcon Jet Field Service Reports and Customer Contact Reports. *See* Petition at 9 & 25. In fact the trial court admitted some of the reports for the limited purpose of notice and impeachment, and plaintiffs examined Falcon Jet witness Fant extensively regarding the admitted exhibits. The remaining reports were excluded upon the trial court's finding, after careful consideration of the issue, that the probative value was outweighed by the danger of unfair prejudice, confusion of issues and misleading the jury. 727 F.2d at 935 (Petition Appendix at A-35 to A-36). In reality, the Petition merely seeks yet another review of the trial court's evidentiary rulings without suggesting any different criteria to replace the well established and accepted review criteria applied by the Tenth Circuit in this case. The Petition should be denied.

B. THE TRIAL COURT CORRECTLY APPLIED THE LAW OF COLORADO IN INSTRUCTING THE JURY ON THE AFFIRMATIVE DEFENSES OF ASSUMPTION OF THE RISK (NO. 46) AND MISUSE (NO. 45), AND THE TENTH CIRCUIT PROPERLY FOUND NO ERROR IN THE TRIAL COURT'S SUBMISSION OF THESE INSTRUCTIONS.

The instructions on the affirmative defenses applicable to plaintiffs' claims based on strict liability in tort were correct statements of the applicable Colorado law. The instructions complied with the approved Colorado Jury Instructions, *CJI-Civ. 2d* 14:17 and 14:22 (1980). *See* Respondents' Appendix C and D.

Colorado has adopted the doctrine of strict liability in tort as set forth in the *Restatement (Second) of Torts* § 402A (1965). *Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975). In *Hiigel*, the Colorado Supreme Court expressly held that the voluntary and unreasonable encounter of a known danger as referred to in § 402A, Comment n, was available as a defense in a strict liability case. In *Anderson* v. *Heron Engineering Co.*, 198 Colo. 391, 604 P.2d 674 (1979), the plaintiff, a passenger injured while riding a ski lift, sued the manufacturer of the ski lift on theories of warranty and strict liability. The Colorado Supreme Court held that the assumption of risk defense based on the knowledge of the active user, the operator of the ski lift and its employees, was available as a defense to the claim of the passive user of the equipment, the injured plaintiff passenger, and should have been submitted to the jury. *See also Martinez* v. *Atlas Bolt & Screw Co.*, 636 P.2d 1287 (Colo. App. 1981), *cert. denied*, (Colo. 1981).

The Colorado cases support the application of the defense of misuse. *See Roberts* v. *May*, 41 Colo. App. 82, 583 P.2d 305, *cert. denied*, (Colo. 1978); *Kinard* v. *Coats Co.*, 37

Colo. App. 555, 553 P.2d 835, *cert. denied*, (Colo. 1976). As the Colorado Court of Appeals stated in *Kinard*:

> [W]e have indicated that misuse by the injured party not reasonably anticipated by the manufacturer can be utilized as a defense by way of showing that the conduct of the user, and not the alleged defect in the product, actually caused the accident. *Bradford* v. *Bendix-Westinghouse Automotive Air Brake Co.*, [33 Colo. App. 99, 517 P.2d 406 (1973)]; *Restatement (Second) of Torts* § 402A, comment h. *See also* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *Minn.L.Rev.* 791.

37 Colo. App. at 557, 553 P.2d at 837.

The Colorado cases clearly establish that the affirmative defenses of misuse and assumption of risk may be used as a defense in a strict liability in tort claim to show that the conduct of the active user of the product is the actual cause of the accident. It was on this basis that the trial court gave the instructions and the Tenth Circuit found no error in the trial court's submission of Instructions 45 and 46.

The record establishes there was substantial evidence in support of the affirmative defenses of misuse and assumption of the risk which were pleaded by the defendants. As the Tenth Circuit points out in its opinion in this case, plaintiffs acknowledged that Richard Bucknell's testimony constituted some evidence of the knowledge of Kenneth Moe and Mountain Bell relating to the effect of manual flight in opposition to an engaged autopilot. 727 F.2d at 928 (Petition Appendix at A-21). Petitioners acknowledge this at page 22 of the Petition. The pilot experts at trial testified that manual flight in opposition to an engaged autopilot is not normal piloting procedure, could not reasonably be expected, and is misuse.

Plaintiffs moved at the close of all of the evidence at the trial of this matter to dismiss the affirmative defenses of misuse and assumption of the risk as to the strict liability claims. The trial court properly denied that motion and

plaintiffs did not appeal that ruling to the Tenth Circuit or to this Court. Plaintiffs did not object to Instructions 45 and 46 before the jury retired as required by Fed. R. Civ. P. 51. Plaintiffs did raise the precise issues presented in their Petition as to these defenses in their post-trial motions for judgment notwithstanding the verdict and for a new trial. As the Tenth Circuit Court of Appeals points out:

> When the trial court ruled on Plaintiffs' post-trial motions, i.e., for judgment notwithstanding the verdict and for new trial, it dealt directly with the contention that it erred by failing to strike the affirmative defenses. The court stated that (a) there was no error when the jury instructions are considered as a whole, (b) the plaintiffs' objections were untimely in that plaintiffs did not at any time tender language distinguishing among the plaintiffs either in regard to the jury instructions or the motion to strike the affirmative defenses, and (c) counsel for plaintiffs made no effort to distinguish among the rights and duties of the passenger-plaintiffs and the other plaintiffs. Finally, and in our view decisive of the contention here presented, the trial court pointed to Instruction 37 regarding imputation of negligence which, in part, read:
>
> > The negligence, if any, of Mountain Bell, Kenneth Moe [pilot] or Rodney Renzelman [co-pilot] is not chargeable to plaintiff Beverly L. Miles or to the Anderson plaintiffs or the Whistler plaintiffs [passengers].
> >
> > . . . .
>
> No error occurred in the trial court's submission of Instructions 45 and 46 when read in context.

727 F.2d at 928 (Petition Appendix at A-21 to A-22).

Petitioners' contention that the trial court and the appellate court failed to apply Colorado substantive law as its rule of decision as required by *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), is without merit and the Petition should be denied.

C. THE APPELLATE COURT DID NOT ERR IN UPHOLDING THE TRIAL COURT'S EXERCISE OF ITS DISCRETION IN ORDERING SEPARATE TRIALS ON ISSUES OF LIABILITY AND DAMAGES.

Petitioners argue that there is a need for standards in the application of Fed. R. Civ. P. 42(b) with reference to bifurcation of trials. This argument is without merit.

Rule 42(b) itself provides the standards and factors to be considered by a trial court in determining whether a matter is to be bifurcated. Rule 42(b) provides:

> (b) *Separate Trials.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Thus, "[t]he provision for separate trials in Rule 42(b) is intended to further convenience, avoid delay and prejudice, and serve the ends of justice. It is the interest of efficient judicial administration that is to be controlling, rather than the wishes of the parties." 9 *C. Wright & A. Miller, Federal Practice and Procedure* § 2388 at 279 (1971) (footnotes omitted). Professors Wright and Miller point out in their treatise:

> Separation of issues of liability from those relating to damages is an obvious use for Rule 42(b).

> Logically liability must be resolved before damages are considered. Often the evidence pertinent to the two issues is wholly unrelated. Thus it is not surprising that courts, in many kinds of litigation, have ordered this separation . . . .

9 *C. Wright & A. Miller, Federal Practice and Procedure* § 2390 at 296-97 (1971).

A ruling on the question of separate trials is within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion or a clear error of law. *See Warner* v. *Rossignol*, 513 F.2d 678 (1st Cir. 1975); *In re Master Key Antitrust Litigation*, 528 F.2d 5 (2d Cir. 1975); *Martin* v. *Bell Helicopter Co.*, 85 F.R.D. 654 (D. Colo. 1980). In the case at bar, the trial court properly exercised its discretion in ordering separate trials on the issues of liability and damages. The liability issues turned on the determination of the cause of the crash, while cause had no bearing whatsoever on the damages issues. The trial of the liability issues in this complex case lasted five and one-half weeks and involved approximately fifty witnesses, including many experts, and some two hundred fifty exhibits. None of the expert testimony and little of the factual witness testimony had any bearing on the damages aspect of the case. Logically, the jury must determine that liability exists before determining the damages issues. Thus, judicial efficiency mandated separate trials. The jury was allowed to focus on the liability issues without having to consider damage evidence.

Petitioners argue that the issues of liability and damages were so intertwined that separate trials led to confusion, uncertainty, and the denial of a fair trial. Petitioners rely upon *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), for this proposition. *Gasoline Products* was not decided under Rule 42(b). Rather, the Court, upon finding an error in the assessment of damages at the trial below, considered whether a new trial would also be mandated on liability. *Gasoline Products* involved a contract action where

the Court determined that a jury would be unable to assess damages without considering the terms, date of formation, and date of breach of the contract. The material dates were in dispute and the jury at the first trial did not determine those dates. Thus, this Court held that it would be impossible to order a new trial on damages alone.

Clearly, the *Gasoline Products* case is inapposite to the case at hand. The present case involves a personal injury action where issues of cause and damage are entirely distinct. Further, in the present case, the appellate court is reviewing the trial court's exercise of discretion in ordering bifurcation pursuant to Rule 42(b). This is not a case where the appellate court found error in the trial below regarding a single issue and had to determine if the jury verdict regarding the remaining issues were tainted as well.

Petitioners' argument that the existence of a punitive damage claim further dictated against bifurcation is without merit. Prior to the commencement of trial, the trial court dismissed the punitive damage claim upon the application of a one-year statute of limitation on penal actions. *See* Colo. Rev. Stat. § 13-21-102 (1973 & Supp.). The trial court's decision to strike the punitive damage claim cannot be considered error on appeal because the jury failed to find any liability on the part of any defendant. Thus no punitive damage claim could have been successfully maintained. *See Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d at 935 (Petition Appendix at A-36); *Harding Glass Co.* v. *Jones*, 640 P.2d 1123, 1127 (Colo. 1982). Clearly, the dismissal of the punitive damage claim can play no part in this Court's consideration of the propriety of bifurcation of the trial.

Bifurcation of the liability and damages issues in the present case was proper and furthered convenience, avoided prejudice, and was conducive to expedition and judicial economy. Petitioners sought to invoke jury sympathy and prejudice in opposing bifurcation and completely disregarded convenience, expedition and economy to the court and jurors. Finally, respondents point out that plaintiffs were in no way

prejudiced by the bifurcation of the liability and damages issues. The right to a trial by the same jury on both issues was preserved. Further, the jury was aware that the airplane crash involved deaths of four occupants and observed survivor plaintiff Miles at trial in a wheelchair. Obviously, the jury was aware that there were serious damages claimed in the case.

The trial court, in the exercise of its discretion, properly employed Rule 42(b) in ordering separate trials on liability and damages issues. The issues were severable and distinct and ordering separate trials furthered convenience, expedition and judicial economy without prejudicing any party. The trial court properly applied the standards set forth in Rule 42(b) and in no way abused its discretion in ordering bifurcation.

D. THE APPELLATE COURT DID NOT ERR IN HOLDING THAT THE JURY INSTRUCTIONS WERE THOROUGH AND ADEQUATE OR IN APPLYING THE "PLAIN ERROR" STANDARD PURSUANT TO FED.R.CIV.P. 51.

Petitioners, in arguing that the Tenth Circuit found that jury Instructions 27A, 29 and 30 misstated Colorado law but did not constitute plain error under Fed. R. Civ. P. 51, misrepresent the holding of the appellate court. In considering petitioners' challenge to jury Instructions 27A, 29 and 30, the Tenth Circuit first established that in view of the lack of objections to the jury instructions by petitioners below, the "plain error" exception to Rule 51 supplied the standard of review. However, after reviewing the instructions in question and Instructions 34 and 37, the Tenth Circuit specifically held: "The instructions of the court, when considered as a whole, as they must be, were thorough and adequate." 727 F.2d at 926 (Petition Appendix at A-16). The appellate court continued: "The jury was, on the basis of totality of instructions, more than adequately advised of the negligence claims and the applicable Colorado law." *Id.* Thus, petitioners failed to show *any* error.

The appellate court in an alternative holding, then assumed arguendo, that if Instructions 27A, 29 and 30 were erroneous, the error was harmless because the jury failed to find any causal negligence on the part of any party. Clearly, petitioners' argument that the Tenth Circuit agreed that the instructions misstated Colorado law constitutes a flagrant misrepresentation of the holding of the appellate court.

Petitioners' authority in its Petition is thus distinguishable because in both cited cases the appellate courts determined that the jury was erroneously instructed. *See Northern Pacific Railway* v. *Herman*, 478 F.2d 1167 (9th Cir. 1973); *Brown* v. *Avemco Investment Corp.*, 603 F.2d 1367 (9th Cir. 1979). In the present case, the Tenth Circuit specifically found that the jury was properly instructed. Accordingly, there is no error and no need to consider whether the appellate court erred in ruling alternatively that error, if any, was harmless.

Northern Pacific Railway v. *Herman*, 478 F.2d 1167 (9th Cir. 1973), cited by petitioners, was not a case decided pursuant to Rule 51. *Northern Pacific* makes no mention of Rule 51 and presumably objections were made to the instructions below. There the appellate court found that the instructions were in error and that a new trial was necessary.

Brown v. *Avemco Investment Corp.*, 603 F.2d 1367 (9th Cir. 1979), is entirely distinguishable from the matter at bar. In *Brown*, the appellate court held that although there was no specific objection made to the jury instructions in question, there was compliance with Rule 51 because the law relating to the jury instructions was argued to the court throughout the course of the trial. Thus the appellate court found that the court, in rejecting plaintiff's legal arguments at trial and in rejecting plaintiff's tendered instruction, was aware of the claimed error. The purpose of Rule 51 was fulfilled and the appellate court found that there was compliance with the rule. 603 F.2d at 1371.

In the present case, there was no like compliance with the purposes of Rule 51 with regard to Instructions 27A, 29 and 30. Moreover, the Tenth Circuit found that the instructions, as given, were thorough and adequate. Thus, regardless of the standard of review, there is no basis for reconsideration of the issues. Respondents refer this Court to the thorough and careful analysis of the law of Colorado and the petitioners' claimed errors found in the opinion of the Tenth Circuit. *See Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d at 923-26 (Petition Appendix at A-10 to A-16).

E. THE APPELLATE COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF NATIONAL TRANSPORTATION SAFETY BOARD (NTSB) INVESTIGATOR JAMES LEWIS REGARDING HIS OBSERVATIONS AT THE SCENE OF THE ACCIDENT BECAUSE THE TESTIMONY DID NOT EMBRACE ANY OFFICIAL NTSB OPINION AS TO THE PROBABLE CAUSE OF THE ACCIDENT.

Petitioners argue that this Court should grant certiorari in order to interpret 49 U.S.C. § 1441(e) (1982) and 49 C.F.R. § 835.3 (1983) regarding testimony of employees of the NTSB. This argument is without merit. The trial court correctly allowed testimony pursuant to 49 C.F.R. § 835.3 regarding observations made by NTSB employees at the scene of the accident. Moreover, the purposes of the statute and regulation were fulfilled as all parties presented independent expert testimony and none offered NTSB employees to supply expert opinion. Finally, petitioners presented deposition testimony of another NTSB employee and elicited comparable testimony.

49 C.F.R. § 835.3 (1983) provides that an NTSB employee may testify to factual information obtained in the course of the investigation. The regulation prohibits testimony "regarding matters beyond the scope of their investigation" or "opinion testimony concerning the cause of the accident." The regulation states that "The use of Board employees as experts to give opinion testimony would impose

a serious administrative burden on the Board's investigative staff. Litigants should obtain their expert witnesses from other sources."

Section 1441(e) and Regulation 835.3 have been interpreted as prohibiting only "conclusory opinions as to the ultimate issue of probable cause of the accident. . . . " *Keen* v. *Detroit Diesel Allison*, 569 F.2d 547, 551 (10th Cir. 1978). *See also American Airlines, Inc.* v. *United States*, 418 F.2d 180 (5th Cir. 1969). In *Keen*, the appellate court upheld the admission of testimony from an NTSB air safety investigator who stated that "the aircraft was functioning normally at high power at the time it struck the ground . . . . " 569 F.2d at 549. It was determined that this testimony embraced the investigator's observations at the accident scene and not the official agency opinion as to the probable cause of the accident.

In the present case, NTSB employee Lewis testified that he found no indication that the engines had been contributory to the accident. This testimony was presented to the jury by way of deposition. It comprised one sentence read to the jury in a trial which lasted more than five weeks. This testimony closely parallels the testimony given in the *Keen* case. The trial court properly interpreted the applicable statute, regulation and case law in allowing the testimony of the NTSB employee regarding his investigation. The testimony did not state any official NTSB opinion of probable cause and merely summarized the investigator's observations at the accident scene. *See* Petition Appendix at W-1 and W-2. Moreover, plaintiffs' Exhibit 3 which was admitted into evidence included the NTSB factual report section prepared by Mr. Lewis. This report contained the statement, "Examinations of both engines and their fuel pumps and fuel controls revealed no evidence of preimpact failure or irregularity." *See* Respondents' Appendix E. Thus, the testimony which petitioners now challenge as error was merely cumulative of the written report which was their exhibit at trial.

Comparable testimony was elicited from another NTSB investigator, Mr. Robert J. Gordon, regarding the accident in question. Gordon testified that the yaw variable bell crank, the Arthur Q Unit, was found in the low position; that the unit was hydraulically cycled from the low position to the high position and no discrepancies were noted; that there was no evidence to indicate in-flight structural breakup of the aircraft; and that there was no evidence of preimpact system failure. Mr. Gordon further testified that there was no physical evidence showing that the component would not have functioned normally prior to the accident. The Gordon deposition was read into evidence, including designations therefrom by both plaintiffs and defendants, during plaintiffs' presentation of the case, without objection to the above observations by the accident investigator.

It is clear from the foregoing that the court properly allowed the testimony in question related to Lewis' observations at the accident scene which did not embrace any official Board opinion as to the probable cause of the accident.

Further, the jury received testimony from numerous experts retained by the parties on each of the issues litigated below. Thus the purpose of § 1441(e) and Regulation 835.3 in precluding litigants from relying upon government investigators as expert witnesses was fulfilled in the present case.

The admission of the evidence was proper and, more important, it was in no way dispositive of the outcome of the case. Petitioners have failed to show any compelling reason for this Court to consider the issue.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WELLER, FRIEDRICH, HICKISCH, HAZLITT & WARD

By: /s/ W. ROBERT WARD

W. Robert Ward
Counsel of Record
Edward J. Godin
100 Fillmore St., Suite 500
P. O. Box 6178
Denver, Colorado 80206
(303) 322-9100

MENDES & MOUNT

Matthew J. Corrigan
Three Park Avenue
New York, New York 10016
(212) 683-2400

Attorneys for Respondent Avions Marcel Dassault-Breguet Aviation

TILLY & GRAVES, P.C.

By: /s/ RONALD O. SYLLING

Ronald O. Sylling
Counsel of Record
David M. Setter
701 Ptarmigan Place
3773 Cherry Creek North Drive
Denver, Colorado 80209
(303) 321-8811

Attorneys for Respondent Falcon Jet Corporation

KELLY, HAGLUND, GARNSEY
& KAHN

By: /s/ EDWIN S. KAHN
Edwin S. Kahn
Counsel of Record
1441 18th Street, Suite 300
Denver, Colorado 80202
(303) 296-9412

PERKINS, COIE, STONE, OLSEN
& WILLIAMS

Keith Gerrard
Richard C. Coyle
Rex Browning
1900 Washington Building
Seattle, Washington 98101
(206) 682-8770

Attorneys for Respondent
The Garrett Corporation

APPENDIX A
COLORADO JURY INSTRUCTION — CIVIL 2d

9:2 Elements of Liability — Comparative Negligence

In order for the plaintiff, (name), to recover from the defendant, (name), on his claim of negligence, you must find all of the following have been proved:

1. The plaintiff incurred (injuries) (damages) (losses);

2. The defendant was negligent; and

3. The defendant's negligence was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (number) propositions has not been proved by a preponderance of the evidence, then your verdict must be for the defendant, and your foreman shall complete only Special Verdict Form A and he and all jurors shall sign it.

On the other hand, if you find that all of these (number) propositions have been proved by a preponderance of the evidence, then your verdict must be for the plaintiff, and your foreman shall complete Special Verdict Form B and he and all jurors shall sign it, unless you also find by a preponderance of the evidence that the plaintiff was contributorily negligent, in which event you shall answer the questions contained on Special Verdict Form C and your foreman shall complete it and he and all jurors shall sign it.

Notes on Use

Except for the third Note on Use to Instruction 9:1, the Notes on Use to that Instruction and to Instruction 9:33 are also applicable to this instruction. Whenever this instruction is given, the appropriate comparative negligence instructions must also be given. See Instructions 9:33-9:40. However, this instruction and in particular the last two paragraphs have been drafted contemplating their use specifically with Instructions 9:35 and 9:36. In cases involving counterclaims

(Instructions 9:37 and 9:38) or multiple parties (Instructions 9:38 and 9:40), this instruction must be appropriately modified to make it consistent with the language and structure of those instructions.

In cases in which the plaintiff is claiming damages for fear of his own safety and for the consequential damages caused by such fright, as opposed to damages associated with physical injuries caused more directly by the alleged negligence of the defendant, and the issue of contributory negligence has been properly raised, the numbered paragraphs of Instruction 9:3 should be substituted for the numbered paragraphs in this instruction, and the questions put in the accompanying comparative negligence instructions must also be revised accordingly.

Use whichever parenthesized words are appropriate.

APPENDIX B
COLORADO JURY INSTRUCTION — CIVIL 2d

14:1 Manufacturer's Liability Based on Negligence — Elements of Liability

In order for the plaintiff, (name), to recover from the defendant, (name), on his claim of negligence, you must find all of the following have been proved:

1. The defendant manufactured the (insert description of article);

2. The defendant was negligent in manufacturing the (description of article) in that he failed to exercise reasonable care to prevent the (description of article) from creating an unreasonable risk of harm to the person or property of one who might reasonably be expected to use, consume or be affected by the (description of article) while it was being used in the manner the defendant might reasonably have expected;

3. The plaintiff was one of those persons the defendant should reasonably have expected to use, consume or be affected by the (description of article); and

4. The plaintiff incurred (injuries) (damages) (losses) which were caused by the defendant's negligence, while the (description of article) was being used in a manner the defendant should reasonably have expected.

If you find that any one or more of these (number) propositions has not been proved by a preponderance of the evidence, then your verdict (on this claim) must be for the defendant.

On the other hand, if you find that all of these (number) propositions have been proved by a preponderance of the evidence, then your verdict (on this claim) must be for the plaintiff (unless you should also find that the defendant's affirmative defense of [insert any affirmative defense other than contributory negligence] has been proved by a

preponderance of the evidence, in which event your verdict must be for the defendant.

Notes on Use

Omit any numbered paragraphs, the facts of which are not in dispute.

Use whichever parenthesized words are most appropriate and omit the parenthesized clause of the last paragraph if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

Whenever the defense of contributory negligence has been properly raised, the numbered paragraphs of this instruction should be substituted for the numbered paragraphs in Instruction 9:2 and that Instruction should then be used in accord with its Notes on Use.

Other appropriate instructions defining the terms used in this instruction, e.g. Instruction 9:4, defining "negligence," must also be given with this instruction, in particular the appropriate instructions relating to causation. See Instructions 9:26-9:30.

In appropriate cases, a more suitable word should be substituted for "manufacturing," etc., e.g. "producing," "canning," "packaging," "inspecting," etc.

For certain presumptions which may be applicable in a product liability action based on negligence, see Instructions 14:24-14:26.

For cases involving the doctrine of res ipsa loquitur generally, see Instruction 9:17, and for cases involving a manufacturer of food or drink sold in sealed containers, see Instructions 14:4 and 14:5.

APPENDIX C
COLORADO JURY INSTRUCTION — CIVIL 2d

14:17 Affirmative Defense — Unreasonable, Knowing Use of Defective Product or Product Not in Compliance with Warranty

The voluntary and unreasonable use of a defective product with knowledge of the specific danger created by a defect is an affirmative defense.

The defendant, (name), is not legally responsible to the plaintiff, (name), on the plaintiff's claim of damages for (sale of a defective product) (breach of warranty) if this affirmative defense is proved. This affirmative defense is proved if you find all of the following:

1. At the time the plaintiff (was) (claims to have been) injured, he had actual knowledge of the specific danger created by the defect which (he claims) caused his (injuries) (damages), and he knew that this specific danger created a risk of (injury) (damage);

2. The plaintiff, while having such knowledge, voluntarily and unreasonably exposed himself to the risk of injury; and

3. The plaintiff's (use) (continued use) of the product was a cause of the plaintiff's claimed injuries.

APPENDIX D
COLORADO JURY INSTRUCTION — CIVIL 2d

14:22 Use of Product in Improper or Unexpected Manner

A manufacturer of a product is not legally responsible for (injuries) (damages) (losses) caused by a product if: (1) the product is used in a manner or for a purpose other than that which was intended and which could not reasonably have been expected; and (2) such use rather than a defect, if any, in the product caused the plaintiff's claimed (injuries) (damages) (losses).

APPENDIX E
PLAINTIFFS' EXHIBIT 3, NTSB POWERPLANT GROUP CHAIRMAN'S FACTUAL REPORT OF INVESTIGATION, PART C at page 073, by JAMES LEWIS

SUMMARY

Both engines were torn away from the airframe at impact.

One fan blade on the left engine and two fan blades of the right engine were broken away at the root section. All other fan blades in both engines were bent in the direction opposite rotation. The fan damage of the left engine was similar to that of the right engine in type and magnitude.

The quill shaft coupling between the low-pressure spool and the fan gearbox in the left engine was sheared in torsional overload. The corresponding right engine shaft was intact.

Ingested dirt was found inside both engines.

There were metallic deposits on the high-pressure turbine blades of both engines.

Examinations of both engines and their fuel pumps and fuel controls revealed no evidence of preimpact failure or irregularity.

CERTIFICATE OF MAILING

I hereby certify that three true and correct copies of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI were mailed by depositing same in the United States mail, postage prepaid, on this day of July, 1984, addressed as follows:

Ronald O. Sylling, Esq.
TILLY & GRAVES, P.C.
701 Ptarmigan Place
3773 Cherry Creek
North Drive
Denver, Colorado 80209

L. B. Ullstrom, Esq.
Robert P. Smith, Esq.
LAW OFFICES OF
L. B. ULLSTROM
601 Broadway, Suite 400
Denver, Colorado 80203

Edwin S. Kahn, Esq.
KELLY, HAGLUND,
GARNSEY & KAHN
1441 18th Street, Suite 300
Denver, Colorado 80202

Philip E. Lowery, Esq.
PHILIP E LOWERY LAW
OFFICES
110 16th Street, Suite 1410
Denver, Colorado 80202

Myles J. Dolan, Esq.
5805 Carr Street
Arvada, Colorado 80004

Keith Gerrard, Esq.
PERKINS, COIE, STONE,
OLSEN & WILLIAMS
1900 Washington Building
Seattle, Washington 98101

Matthew J. Corrigan, Esq.
MENDES & MOUNT
Three Park Avenue
New York, New York 10016

/s/ W. ROBERT WARD

W. Robert Ward
Counsel of Record for
Respondent
Avions Marcel
Dassault-Breguet Aviation
On Behalf Of All Respondents

AFFIDAVIT OF MAILING

I, W. Robert Ward, attorney for Respondent Avions Marcel Dassault-Breguet Aviation, hereby certify that on the day of July, 1984, I deposited in the United States mail, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, forty copies of this RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

/s/ W. ROBERT WARD

W. Robert Ward
Counsel of Record
100 Fillmore St., Suite 500
P. O. Box 6178
Denver, Colorado 80206
(303) 322-9100
On Behalf of All Respondents

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I hereby certify that the foregoing document was acknowledged before me this day of July, 1984 by W. Robert Ward.

Notary Public

My commission expires: _____